

# THE DESTRUCTION OF SOCIAL CAPITAL THROUGH LAW

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## INTRODUCTION

The articles presented here portray several different conceptions of the relationship between the realm of formal state law and the realm of social norms—as well as various views on what economic analysis might contribute to our knowledge of that relationship. Robert Ellickson's pathbreaking work describes two parallel domains, largely segregated from and irrelevant to each other; the norms of Shasta County arise and are maintained not in the shadow of the law, but in ignorance of it.<sup>1</sup> Robert Cooter offers a more normative and synthetic vision, but it is a synthesis in which state law should understand itself primarily as the passive, Hayekian reflector of a dynamic, creative domain of social norms formed under the appropriate decentralized and efficiency-tending conditions.<sup>2</sup> A third view emerges from several members of what might be called the Pennsylvania contingent (that this convergence arises from discrete empirical studies of seemingly disparate fields, such as commercial law and labor law, makes these findings particularly provocative).<sup>3</sup> On this third view, state law and social norms are still viewed as parallel, separate domains; yet both are

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<sup>1</sup> See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>2</sup> See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694-95 (1996) (arguing that the lawmaker's role should be to find community norms, apply structural tests to determine whether these norms have developed under efficiency-tending conditions, and then enforce those norms that pass this structural test).

<sup>3</sup> See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1766-71 (1996) (arguing that the UCC's underlying philosophy of using immanent business norms to decide cases undermines merchants' implicit reliance on the distinction between relationship-preserving and endgame norms); Jason S. Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859, 1859-1868 (1996) (arguing that the Statute of Frauds's writing requirement should not be abolished because parties rely upon it in non-repeat transactions, although it does not affect their ongoing relationships). I include Lisa Bernstein in the "Pennsylvania contingent" because she visited there while working on her Symposium contribution, and I am freely speculating about institutional influences.

highly relevant to those they regulate (contra Ellickson), and nonetheless the regulated parties prefer *ex ante* to keep the two domains independent and distinct (contra Cooter). This complex position emerges because state law and social norms have different substantive characteristics, at least in the commercial context: To borrow from sociologists of law, state law is "cold," social norms are "warm."<sup>4</sup> Hence different phases of commercial interaction justify the application of different principles; social norms for ongoing relationships, state law for endgames. Commercial actors bargain in the shadow of both regimes, but to unify these regimes—by letting one subordinate the other—would be to undermine the overall efficiency of commercial transactions.

Cass Sunstein's article presents a fourth and wholly different view. Drawing more on the domain of general public-policy than that of commercial exchange, Sunstein emphasizes state law as an instrument for the *production* and *reshaping* of social norms.<sup>5</sup> This view pictures law and norms as neither independent nor easily separated. Sunstein instead envisions two mutually constituted realms, though he focuses primarily on one direction of that influence: that of law on norms. This interdependence I want to explore a bit further.

I share many of Sunstein's views about the need for both positive and normative legal theory to embrace a more complex appreciation of the interdependence between law and social norms.<sup>6</sup> This intertwining can be approached in different ways for different purposes: as the dependence of individual rationality upon social norms; as the connection between personal preferences

<sup>4</sup> See INGA MARKOVITS, *IMPERFECT JUSTICE: AN EAST-WEST GERMAN DIARY* 44, 55 (1995).

<sup>5</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

<sup>6</sup> See generally Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 749-51 (1994) (arguing that the distinction between norms governing legitimate state action in different spheres should play a more direct role in constitutional adjudication); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-16 (1993) (arguing that many constitutionally recognized harms are best understood as involving expressive injuries rather than more narrowly understood material injuries); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2151 (1990) (arguing that appropriate reasons to justify actions must take account of expressive concerns as well as more consequentialist concerns).

and social norms; or as the need to evaluate and understand actions not just in terms of the more familiar material consequences they produce, but also in terms of what those actions are perceived to mean. Given my basic agreement with Sunstein about the limitations of current legal thought in these respects, I will focus here on two points. First, I want to clarify the claim being made to avoid certain common misunderstandings. Second, and more centrally, I want to turn Sunstein's article on its head a bit and explore a darker side to the interrelationship between state law and social norms. I am interested in what might be called law's *norm-destroying capacity*, rather than its norm-producing capacity. If law and public policy influence social norms in ways Sunstein suggests, this influence will not necessarily be an optimistic, productive one. By the norm-destroying capacity of law, I mean nothing as profound as Robert Cover's vision of the "jurispathic" quality of state law's destruction of competing subcultural value systems.<sup>7</sup> My focus is on the more quotidian ways in which state law can undermine general, yet crucial, social norms—norms ironically necessary for the effective realization of state law itself.

#### I. LIBERALISM AND THE LIMITS OF STATE ATTENTION TO SOCIAL NORMS

First, arguments of the kind Sunstein offers for greater attention to the effect of law on norms are often mistaken as justifications for a more expansive conception of the proper *ends* of government. To note that law influences norms, and that norms influence the effectiveness of laws, is taken as tantamount to arguing that government should directly pursue norm manipulation as one of its ends. Such a view raises the specter of an "industrial policy for norm generation," as one participant at this Symposium put it, or the specter of precisely the kind of oppressive state that liberalism as a political philosophy was meant to avert. To avoid these dangers, critics might argue, government should stay out of the business of norm manipulation altogether.

I think Sunstein's arguments are best cast in different and more limited terms. To begin, the argument is as much descriptive as normative. Those of us who have urged greater attention to the expressive dimensions of law and public policy consider it inevitable

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<sup>7</sup> See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 160-68 (1983).

that "cultural consequences" as well as "instrumental consequences" are at stake when government acts.<sup>8</sup> Ignoring the way law works on background norms simply is not an option, at least in many contexts. Behavior is guided not just by formal rules, but by the interaction between such rules and beliefs, social norms, values, cognitive means of processing information, psychological frames, and other factors. At the extreme, laws will be self-defeating when they undermine social norms whose maintenance turns out to be necessary to makes those very laws effective.<sup>9</sup> Even for purely predictive purposes, policymakers must be aware of the way state-generated rules and social norms are likely to influence each other. If to say government should avoid norm manipulation means that policymakers should ignore the full range of consequences their decisions will have, such a wilful self-blinding would hardly enhance the success of public policies.

This point has implications for the tension between economists and others within law schools. In a meditative essay, Avery Katz argues that this tension stems from a "cultural clash" between the largely empiricist, predictive aims of economics and the more normative aspirations of disciplines like law. "[E]conomists are unified in their commitment to positivism and to the idea that one can usefully proceed while putting normative issues to one side, and lawyers are not."<sup>10</sup> There is something to this idea, but it might better explain the initial resistance to economics in law schools a generation ago, rather than today. Many contemporary critics do not challenge the positivism of economics per se. Rather, the principal concern is that economic analysis of law sometimes becomes *bad* positivism.<sup>11</sup> When rational-choice models of social

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<sup>8</sup> See Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 938 (1991).

<sup>9</sup> After presenting this Comment, I came across a similar idea in Philip Pettit's *The Cunning of Trust*, in which he argues that "certain intrusive forms of regulation can be counter-productive and can reduce the level of performance in the very area that they are supposed to affect. . . . If heavy regulation is capable of eradicating overtures of trust, and of driving out opportunities for trusting relationships, then it is capable of doing great harm." Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 225 (1996).

<sup>10</sup> Avery Katz, *Positivism and the Separation of Law and Economics*, 85 MICH. L. REV. (forthcoming June, 1996) (manuscript at 29).

<sup>11</sup> As an example, I take this to be the point of David Charny's withering critique of Thomas Philipson and Richard Posner's prescriptions for public-health policy regarding AIDS. See David Charny, *Economics of Death*, 107 HARV. L. REV. 2056, 2080 (1994) (reviewing TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993)) ("Private

interaction or economic approaches to law prescribe policy based on assumptions of a sharp separation between law and norms, they are likely to predict behavior poorly and channel policy in misguided directions. Simply at the level of understanding behavior sufficiently well to make sensible policy, policymakers must take account of the way that law and norms interact.

In addition, I do not think arguments like Sunstein's should be taken in the direction of licensing government pursuit of norm modification in and of itself. That is, attention to the expressive dimensions of public policy and law should not be understood to supplant or clash with prior frameworks justifying state action and defining its boundaries. As an example from within political liberalism, if Mill's "harm to others" principle is taken to represent the prerequisite for justified state coercion, Sunstein's arguments should not be understood to modify that principle. Instead, they are better understood as operating within it. Government action is still justified only when "harm to others" occurs; once that precondition has been met, however, the most effective way of regulating that harm might well require taking account of the way laws and norms interact. But a bare governmental interest in regulating social norms intrinsically—in "making a statement"—should not in and of itself justify *coercive* forms of state action, such as criminalization, that would not be independently justified within the appropriate political philosophy.<sup>12</sup> Arguments that require sophisticated policymakers to attend to the cultural as well as the instrumental consequences of policy need not justify an "industrial policy for norm generation."<sup>13</sup> Sunstein is right to emphasize the interde-

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*Choices* provides yet another example of economic analysis distorted by faulty normative and methodological premises.”).

<sup>12</sup> Government might, however, properly pursue more purely expressive ends when it acts through *means* other than coercion, such as education or perhaps subsidization. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 420 (1986) (“[T]he harm principle allows perfectionist policies so long as they do not require resort to coercion. It deserves its place as a liberal principle of freedom not because it is anti-perfectionist. . . . [but because] it sets a limit on the means allowed in pursuit of moral ideals.”). For legal analysis of the different constraints on government as coercive regulator versus government as educator, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* 214 (1983) (asserting that the Establishment Clause “is the only substantive constitutional constraint on what government may say”). For an interesting defense of perfectionist liberalism that respects these liberal constraints, see Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385, 394-400 (1996).

<sup>13</sup> In an article that shares much of Sunstein's concerns with the expressive dimensions of public policy, Dan Kahan takes what I read as a contrary view on this

pendence of state law and social norms; but stressing this relationship need not raise certain commonly invoked specters of boundless and oppressive state efforts to manipulate social norms unanchored in a larger political philosophy that defines the appropriate limits of state action.

## II. SOCIAL CAPITAL AND STATE LAW

Once state law and social norms are seen as interdependent, their interrelationship might take many forms. We might think of these as parallel systems of social control, which operate with indifference to each other. We might think of the two systems as Sunstein does, with law working productively to draw on or influence social norms in ways that make law more effective. But I want to emphasize the capacity of state law to destroy social norms in ways that undermine both law and norms. The post-New Deal regulatory state is so pervasive that we might think it has squeezed out any significant role for social norms. But even in the modern administrative state, norms continue to be central means of creating and sustaining social, economic, and political interaction.<sup>14</sup> Moreover, failure to appreciate the place of norms within a system of state law can lead law into a destructive relationship with these important norms. To see this destructive possibility, I begin with the lessons a variety of disciplines recently have offered on the continuing significance of social norms.

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point. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 66 U. CHI. L. REV. (forthcoming, Spring 1996). Kahan accepts the view that concern for the expressive dimensions of action can in principle justify the criminalization of conduct that is purely expressive, that is, conduct that does not violate Mill's "harm to others" principle, such as, arguably, consensual acts of sex between adults of the same sex. See *id.* (manuscript at 9). Kahan then argues against criminalization of such conduct not in principle, but on the ground that such regulation would make the wrong substantive statement. See *id.* (manuscript at 9-10). I would not go this far because I would not abandon the traditional liberal view that state coercion is justified only when "harm to others" occurs; I do not think attention to the expressive dimensions of public policy and law should be understood to clash with or undermine the general framework of liberal political justification for state action.

<sup>14</sup> For a somewhat different perspective on this point, see generally WILLIAM I. MILLER, *HUMILIATION* (1993), which argues that much of social interaction is governed by more traditional norms, such as those of honor and reciprocity, even in the face of the pervasive, modern regulatory state. See, e.g., *id.* at 51-52 ("[D]espite the claims of the law, the state, and certain religions, within certain groupings we still live as if we were people of honor . . . . Amazingly, in spite of the reputed all-intrusive evil hegemony of modern institutions, we still manage to create spaces for ourselves within which we function rather preindustrially for all that.").

Paradoxically, rational-choice theory and collective-action theory have done much to bring out the dependence of effective collective action upon norms of cooperation.<sup>15</sup> The practice of cooperation, grounded in norms of reciprocity, must be robust precisely because short-term self-interest presents so many occasions for opportunistic action. Potential prisoners' dilemmas emerge everywhere; if third-party enforcement, in the form of state laws and state execution of those laws, were the principal tool for surmounting these dilemmas, the state would have to become even more pervasive. But the more closely we examine social interactions, the more we notice the extent to which decentralized extra-state "enforcement" fills this gap;<sup>16</sup> social norms, particularly norms of reciprocity, sustain practices of cooperation enforced through private action. Indeed, if we could somehow quantify potential prisoners' dilemmas and compare those surmounted through effective norms and those through formal state laws, it seems likely that norms would dwarf state enforcement in importance. Rational-choice scholarship has little to say about how such norms arise, but it does recognize that once they do arise they might be self-sustaining as long as cooperation is reciprocated.<sup>17</sup>

A striking concrete example comes from "perhaps the most influential book ever written on cities."<sup>18</sup> Jane Jacob's detailed mosaic of city life, *The Death and Life of Great American Cities*, opens with three chapters devoted to the function of sidewalks.<sup>19</sup> Jacobs argues that safety and comfort on the streets is the crucial factor in making some districts vital in urban areas and others desolate; she

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<sup>15</sup> For one of the best studies of these issues, see RUSSELL HARDIN, *COLLECTIVE ACTION* 3 (1982). For the argument that noncooperation is the dominant strategy of outcome-oriented rational actors, see JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 203 (1989).

<sup>16</sup> For a critique of "legal centrism," the view that problems of private ordering necessarily require state intervention, particularly in the form of command-and-control type regulation, see Cooter, *supra* note 2, at 1644-46.

<sup>17</sup> In political science, the standard reference for the mathematical demonstration of this point is ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 173-75, 177 (1984). For concrete case studies, see ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 184 (1990) ("When individuals have lived in such situations for a substantial time [situations in which they can communicate, interact, and develop trust] and have developed shared norms and patterns of reciprocity, they possess social capital with which they can build institutional arrangements for resolving CPR [common pool resource] dilemmas.").

<sup>18</sup> Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1171 n.22 (1996).

<sup>19</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

then asks what conditions make streets safe or not. Formal law-enforcement can play only a minimal role—particularly in the intricate ways that make certain neighborhoods thrive, while others stagnate. There simply are not enough police to go around, nor, even in these days of community policing, would we want there to be. As Jacobs puts it, order is maintained more through social policing than state policing.<sup>20</sup> In healthy neighborhoods, those with a specific stake in the streets, such as shopkeepers, and those drawn to the street to shop, gossip, and watch others, maintain order in numerous and complex ways.<sup>21</sup> This informal enforcement of norms is particularly noteworthy because it does not take place within the kind of close-knit, solidaristic groups sometimes envisioned as necessary to sustain informal norms.<sup>22</sup> Norm enforcement is too pervasive to be sustainable only in such exceptional circumstances. In thriving districts, even more diffusely linked groups with less densely structured interactions nonetheless enforce norms of “reasonable street use” that sustain a local system of social order.

A similar point about the dependence of formal policies on effective background norms is emerging from studies of the differential success economists are having in aiding the transition in various post-socialist countries “from Marx to markets.”<sup>23</sup> Simply transposing Western regimes of free contract and private property, along with the institutional framework that undergirds these regimes, such as recording systems, has not been similarly successful in different countries in enabling well-functioning market systems. In some places, businesses exploit customers for short-term gains but at long-term reputational costs that they have failed thus far to appreciate; in others, store clerks have to be trained to be attentive

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<sup>20</sup> See *id.* at 31-32 (“[Sidewalk and street peace] is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves. . . . No amount of police can enforce civilization where the normal, casual enforcement of it has broken down.”); see also Diego Gambetta, *Can We Trust?*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 221 (Diego Gambetta ed., 1988) (“Societies which rely heavily on the use of force are likely to be less efficient, more costly, and more unpleasant than those where trust is maintained by other means.”).

<sup>21</sup> Ellickson additionally emphasizes informal social controls on street behavior: “an orderly user of a public space routinely evaluates not only disorderly people but also other orderly people who could enforce norms there.” Ellickson, *supra* note 18, at 1197.

<sup>22</sup> See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1706 (1996).

<sup>23</sup> I borrow the phrase from a course of that name, on economies in transition, that Robert Ellickson and Michael Heller taught initially at Yale Law School.



to customers rather than insulting to them.<sup>24</sup> As Carol Rose puts it, summarizing some of these findings, "capitalist property has a kind of moral and cultural infrastructure that we may have mistakenly thought was simply natural, whereas in fact it is learned through sustained commercial practice, and lost when those practices deteriorate."<sup>25</sup> Among other qualities, this structure includes the ability to generate confidence and trust in cooperative relationships, or a shared acceptance of cultural lines such as those between theft and legitimate market competition, or a recognition of shared ground rules within which competition appropriately takes place.<sup>26</sup>

These two examples, one of local neighborhood success, the other of successful economic systems, suggest that background social norms are as important as the formal apparatus of the state in sustaining successful patterns of interactions across many spheres. Loosely put, these background norms might be described as norms of reciprocity: norms that sustain what is perceived to be "a fair system of cooperation over time."<sup>27</sup> As the philosopher Allan Gibbard puts it, many of the chief moral sentiments upon

<sup>24</sup> Reports detailing these practices are discussed in Carol Rose, *Propter Honoris Respectum: Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 354 nn.142-44 (1996).

<sup>25</sup> *Id.* at 354. James Krier has long critiqued the failure of some economic analysis of property regimes to recognize that state enforcement of private property rights itself requires commitments to cooperation. See James E. Krier, *The Tragedy of the Commons* (pt. 2), 15 HARV. J.L. & PUB. POL'Y 325, 338 n.44 (1992) ("[A] private property regime can only be achieved through cooperation, yet the absence of cooperation is the very problem that [some economic analysts] thought private property developed to solve.").

<sup>26</sup> On the role of trust in sustaining commercial relationships, see, for example, FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 8 (1995) (attributing economic success in enterprises to situations in which "economic actors supported one another because they believed that they formed a community based on mutual trust"); Charles F. Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*, in *INDUSTRIAL DISTRICTS AND LOCAL ECONOMIC REGENERATION* 215, 229-30 (Frank Pike & Werner Sengenberger eds., 1992) (describing the success of an economic development project in Pennsylvania).

<sup>27</sup> The phrase recurs throughout much of the political philosophy of John Rawls. See JOHN RAWLS, *POLITICAL LIBERALISM* 16 (1993) (arguing that "[f]air terms of cooperation specify an idea of reciprocity"). Indeed, the animating idea of Rawls's political philosophy, "justice as fairness," is precisely the idea of society as a fair system of cooperation among free and equal persons. See JOHN RAWLS, *A THEORY OF JUSTICE* 11-17 (1971). For a significant recent effort in legal scholarship to develop the concept of reciprocity as the central organizing ideal of a body of formal state law—in this case, tort law, see GREGORY C. KEATING, *REASONABLENESS AND RATIONALITY IN NEGLIGENCE THEORY* 311 (1996).

which norms depend "are reciprocal overtly: a sense of fair dealing, feelings of gratitude, urges to retaliate."<sup>28</sup>

These norms of reciprocity can further be disaggregated into two types. One is specific or local reciprocity; this is the kind Axelrod addresses, which sustains ongoing relationships between specific parties.<sup>29</sup> This is reciprocity as mutual exchange in direct, one-to-one interactions. Reciprocity of this kind is specific to the ongoing dynamic interactions within a particular relationship. The second might be called generalized reciprocity. This is a more global predisposition to be motivated by norms of reciprocity and cooperation even when acting in new settings or with new agents outside some previously established relationship. From another disciplinary angle, Alexis de Tocqueville, still the most incisive sociologist of democracy, noticed mechanisms in well-functioning democracies through which specific reciprocity gets transformed into generalized reciprocity. Observing democracy for the first time, de Tocqueville was primarily concerned that American equality, unlike the social and political order of his own, aristocratic France, would make people more inward-focused—not selfish, but more independent and atomistic.<sup>30</sup> For de Tocqueville, the great danger of democracies is that individualism will produce a passive citizenry prone to despotic takeover.<sup>31</sup> But he observes that democracies succeed in drawing people out of their individualism through the recognition that self-interest itself requires acknowledgement of mutual dependence: "Men learn to think of their fellow men from ambitious motives."<sup>32</sup> From this starting point, de Tocqueville articulates a mechanism through which local acts of cooperation become generalized toward a more public-regarding disposition necessary to avoid the distinctly democratic dangers of rampant individualism: "Men attend to the interests of the public, first, by necessity, afterwards by choice; what was intentional

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<sup>28</sup> ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 261 (1990).

<sup>29</sup> See AXELROD, *supra* note 17, at 60 (noting that "[i]t is easier to maintain the norms of reciprocity in a stable small town or ethnic neighborhood").

<sup>30</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 104 (Vintage Books ed. 1945) (1835) ("Individualism [is distinct from selfishness and] is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself.").

<sup>31</sup> See 2 *id.* at 109 ("Despotism, then, which is at all times dangerous, is more particularly to be feared in democratic ages.").

<sup>32</sup> 2 *id.* at 110.

becomes an instinct, and by dint of working for the good of one's fellow citizens, the habit and the taste for serving them are at length acquired."<sup>33</sup>

While de Tocqueville is best known for his emphasis on the importance of civil society to democracy—in the form of local, participatory associations—his account of the causal mechanisms at work is perhaps less well appreciated. Civic society and local government are crucial not just because local solutions to local problems are more likely to be effective, or because the expressive and psychological benefits of public participation can best be realized in town meetings. Instead, it is through small-scale associations that de Tocqueville believes commitments to specific reciprocity are first developed. But as these habits of cooperation are formed and experienced, they become generalized into a more global disposition toward reciprocity. Thus, local participatory associations become the mechanism for generating general social norms organized around principles of reciprocity. Local associations provide the vehicle through which habits of, and dispositions toward, cooperation are cultivated:

It is difficult to draw a man out of his own circle to interest him in the destiny of the state, because he does not clearly understand what influence the destiny of the state can have upon his own lot. But if it is proposed to make a road across the end of his estate, he will see at a glance that there is a connection between this small public affair and his greatest private affairs—this multiplies to an infinite extent opportunities of acting in concert for all the members of the community and makes them constantly feel their mutual dependence.<sup>34</sup>

To return to the insight of Jane Jacobs and recent experience with economies in transition from socialism to markets, social norms of this sort are just as important as formal state laws in making democratic politics and market institutions effective.

A last vantage point on this relationship between norms and laws, perhaps the most important, comes from recent work in comparative political science. Robert Putnam, whose work on democracy has been compared (with some exaggeration) to that of de Tocqueville,<sup>35</sup> has argued that the amount of "social capital" a society contains turns out to be the crucial factor in the success of

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<sup>33</sup> 2 *id.* at 112.

<sup>34</sup> 2 *id.* at 111.

<sup>35</sup> See *Civics Lessons: Pro Bono Publico*, *ECONOMIST*, Feb. 6, 1993, at 96, 96.

its political and economic institutions.<sup>36</sup> Social capital includes features of social organization, such as strong social norms of trust and cooperation, as well as effective structures and networks of "civic engagement" within which these norms can develop and be sustained, that improve the efficiency of society by encouraging coordinated actions.<sup>37</sup> Social capital can be analogized to other forms of capital; like physical assets a borrower puts up to secure a loan, social capital can serve as a kind of collateral. As the economist Kenneth Arrow has put it, and as other papers in this Symposium emphasize, "[v]irtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time."<sup>38</sup> The more one can offer credible commitments to behave in a trustful way, for example by respecting norms of reciprocity such as fair dealing, the less financial capital one needs to secure a loan.

Putnam's signal contribution was to offer striking empirical confirmation of the role of social capital. He compared regional governments across Italy that operated with high degrees of autonomy since the early 1970s. After determining which of these regions were most successful, both in terms of the perceived legitimacy of its political institutions and the performance of its economy, Putnam examined numerous possible theories that might account for the differential patterns of success. He concluded that the most important predictive and causal factor in these patterns was the level of social capital—the measurable strength of norms of reciprocity and networks of civic engagement. "Virtually without exception, the more civic the context, the better the government."<sup>39</sup> Or as Putnam puts it in a more provocative phrase, "[g]ood government in Italy is a by-product of singing groups and soccer clubs . . . ."<sup>40</sup>

<sup>36</sup> ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

<sup>37</sup> *Id.* at 167. The concept of "social capital" was first developed extensively in JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-21 (1990).

<sup>38</sup> Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFFAIRS* 343, 357 (1972). See generally Bernstein, *supra* note 2.

<sup>39</sup> PUTNAM, *supra* note 36, at 182.

<sup>40</sup> *Id.* at 176. In subsequent essays, Putnam has argued that the United States has seen a serious decline in social capital over the last generation, with major implications for politics and markets. See Robert Putnam, *The Strange Disappearance of Civic America*, *AM. PROSPECT*, Winter 1996, at 34; *Robert Putnam Responds*, *AM. PROSPECT*, Mar.-Apr. 1996, at 26.

In thinking about the relationship between norms and law, then, the first point is that norms of reciprocity, and the conditions necessary to facilitate their development and maintenance, are as important as formal laws to the success of democratic politics and free markets. The second point, which Sunstein emphasizes, is that formal law and such norms are not independent of and irrelevant to each other; laws can structure and influence these norms, a fact to which wise policymakers must attend. And the third point, to which this Comment now turns, is that this relationship can be a destructive one. In several ways, state law can unintentionally undermine the social capital that turns out to be so central to the vitality of well-functioning political and economic systems.

### III. STATE DESTRUCTION OF SOCIAL CAPITAL

I will offer three brief accounts of ways in which law and policy can destroy social capital. These are skeletal accounts, meant to be exemplary and suggestive.

#### A. *Destroying the Social Conditions that Enable Reciprocity*

After portraying the role of social policing in the vitality of city neighborhoods, Jane Jacobs turns to an indictment of the kind of modern urban planning that began in the 1950s and continues to some extent today.<sup>41</sup> Jacobs argues that certain structural conditions are necessary to enable the kind of street interactions that generate norms of informal social policing: (1) facilities must be available that attract people to the street, like bars, restaurants, grocery stores; (2) the proprietors of these entities must develop specific interest in policing the street; (3) these places must then attract people to the streets, which gives yet others who like "people watching" a further reason to populate the streets. Streets become filled with people, some of whom are watchers, some of whom are being watched. This social structure works best when it is largely unconscious; people populate the street and watch the street because it is fun, and may be only dimly aware that they are also keeping order.<sup>42</sup>

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<sup>41</sup> See JACOBS, *supra* note 19, at xiv ("[A]nticity planning remains amazingly sturdy in American cities. It is still embodied in thousands of regulations, bylaws, and codes, also in bureaucratic timidity owing to accepted practices, and in unexamined public attitudes hardened by crime.").

<sup>42</sup> See *id.* at 73 ("The trust of a city street is formed over time from many, many

Jacobs argues that technically trained experts on city planning rarely understand this fact because they do not understand how social norms control the vibrancy and safety of streets. Redevelopment projects in the last generation were built on the assumption that people want order and quiet; they were built away from the street and left open spaces below ("islands within the city"<sup>43</sup>) without places to congregate. One result was that the only contact people could have required greater personal intrusion; one had to be invited into an apartment for a cup of coffee, because no nearby public places existed for more casual contact. Faced with such all or nothing choices, the most common result was that people chose to have no contact at all with neighbors.<sup>44</sup> Areas with extremely high dwelling densities, like Boston's North End, were viewed during the heyday of urban planning as overcrowded slums, in need of renovation.<sup>45</sup> Streets come to lack a public life precisely because such a life was perceived as dangerous; a vibrant street life was the very thing orthodox urban planning essentially sought to avoid.

In contrast, Jacobs argues that dense concentrations of people are a necessary condition for flourishing neighborhoods and safe streets.<sup>46</sup> The least safe places are, in fact, those with a low density of dwellings.<sup>47</sup> Rather than isolating people, the aim of city design ought to be to find ways for people to flow together and have many points of contact on the streets.<sup>48</sup> The norms of mutual trust and cooperation so crucial to the social (as opposed to state) policing that ultimately determines the safety of streets cannot be developed in the absence of structural features that encourage sufficiently dense and repeated social interactions. Ironically, in their efforts to create safe neighborhoods, expert planners redesigned areas of cities in ways that undermined the sites needed to enable norms of cooperation and trust to emerge.

The point can be generalized: In Jacobs's account, repeated street encounters are the equivalent of Putnam's "networks of civic engagement." As long as policymakers remain fixated on formal policies and official state laws, they will fail to see the central role

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little public sidewalk contacts.").

<sup>43</sup> *Id.* at 61.

<sup>44</sup> *See id.* at 85.

<sup>45</sup> *See id.* at 42-43, 265.

<sup>46</sup> *See id.* at 267.

<sup>47</sup> *See id.* at 267-68.

<sup>48</sup> *See id.* at 238.

that more informal social norms play in underwriting social, economic, and political order. Not recognizing the cost of doing so, policymakers can destroy the structural conditions that enable these networks of civic engagement to flourish, thereby diminishing the ability to develop the requisite norms of trust and cooperation. Because social capital is crucial to the success of formal state policies, these policymaking decisions necessarily become self-defeating. Thus, one way state law can interact destructively with social norms—in ways that undermine the aims of state law itself—is through destroying the social conditions necessary to enable relevant norms of reciprocity and cooperation to flourish.

### B. *Direct Attacks on Norms of Reciprocity*

State laws can also attack central social norms more directly. Consider an influential economic analysis of the vexing problem of legal transition policy. The transition problem is whether government should have an obligation to compensate those who are disadvantaged by changes in regulatory policy that are, on balance, desirable. Traditionally, government has been thought to have distinct obligations to compensate for some harms it inflicts on innocent private actors; these obligations are embodied in constitutional provisions, such as the Takings Clause and the Contracts Clause.<sup>49</sup> But approaching the problem through the lens of economics, Louis Kaplow argues that such harms should go uncompensated except in exceptional circumstances not present in most traditional cases of court-ordered compensation.<sup>50</sup>

The key move in Kaplow's argument is that all declines in the value of current property holdings should be treated the same, whatever the source imposing the loss in value. Thus, "[a] private

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<sup>49</sup> See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (takings). For a view of the Contracts Clause which emphasizes its role in preserving what today might be called social capital, see *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 354-55 (1827) (Marshall, C.J., dissenting) (arguing that the Constitution recognized that government interference with norms of contract would "destroy all confidence between man and man," would "sap the morals of the people," and would "destroy the sanctity of private faith").

<sup>50</sup> See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 530 (1986) (arguing that people should anticipate and prepare for the possibility that government actions will adversely affect their investments in the same way that "investors in land or equipment located in a high-risk earthquake or flood zone should take into account the possibility that their project will be destroyed"). For a more detailed critique of this approach to the transitions problem, see Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1533-37 (1992).

actor should be indifferent as to whether a given probability of loss will result from the action of competitors, an act of government, or an act of God . . . ."<sup>51</sup> From a purely economic perspective, according to Kaplow, all economic losses are the same, whatever their source and whatever the justification for imposing them. For purposes of public policy, we should therefore analyze them the same way; we should no more compensate someone for destruction of their property that occurs through deliberate governmental action than through natural or market forces.

Yet once we appreciate the importance of social capital, it becomes easier to explain why legal doctrine in this area has long resisted the kind of economic approach Kaplow suggests.<sup>52</sup> Government action, unlike natural forces, reflects deliberate and intentional decisionmaking by a group to inflict burdens on specific individuals; by imposing exceptionally concentrated burdens on specific individuals, over and above those widely and more diffusely distributed burdens, government deliberately violates what might be considered baseline norms of reciprocity. The social contract might be understood to require each person to sacrifice roughly proportionately to the sacrifices of others, or to the benefits one receives from burdens imposed on others; but to require innocent actors to suffer unusually devastating losses—and to have those losses go unacknowledged and uncompensated—is another matter. Even if government must single out individuals for such losses in order to realize important public goods, the failure of government to acknowledge that it is imposing exceptional harms generates additional injuries beyond those directly associated with the decline in property values. These are the harms associated with what I would call the destruction of norms of reciprocity, or what Frank Michelman calls "demoralization costs."<sup>53</sup> They arise when individuals perceive government not to be treating them fairly, that is, according to general norms that require a fair reciprocity of the burdens and benefits of government action.

The government's violation of norms of fair dealing is surely capable of triggering the same kind of intense emotional responses that attend the sense of being cheated anywhere else.<sup>54</sup> As long as

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<sup>51</sup> Kaplow, *supra* note 50, at 534 n.70.

<sup>52</sup> For a similar economic analysis to that of Kaplow, see Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 528 (1927).

<sup>53</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1214 (1967).

<sup>54</sup> See GIBBARD, *supra* note 28, at 261 ("We loathe being cheated, often far more



any parcel of property is burdened roughly as intensively as comparable parcels, government regulation can be seen as part of a system of cooperation on mutually fair terms. That is what respect for reciprocity entails. But if government singles out isolated property holders for devastating losses, and then treats them as if they have suffered something akin to a natural disaster, an additional violation occurs. The role of compensation now becomes easier to see: Compensation is best understood as an expression of government's recognition that its actions violate these norms of reciprocity, even if those actions nonetheless serve worthy public goals.<sup>55</sup> Compensation is thus a means for government to acknowledge the continuing force of norms of reciprocity. In other words, when desirable legal transitions take place, the payment of compensation might be an important means—perhaps the most effective means—of nonetheless preserving social capital by the state's expression of respect for the norms of reciprocity at stake.

As concrete confirmation of this expressive role that compensation plays, consider the findings of those who have studied efforts in various countries to break up large landholdings and redistribute land more equitably.<sup>56</sup> Across many different countries, the least successful means of doing so occurs when government simply takes large parcels of land and redistributes them without paying any form of compensation; such policies provoke the most violent, bitter, and alienated responses from wealthy landowning classes. In contrast, when government takes land but pays compensation, the compensation rarely comes close to replacing the actual fair market value of the land, particularly in poor and less developed countries. Nonetheless, compensation is socially perceived as an acknowledgment that government is overriding valid claims, and a sign of respect for the harms inflicted. When compensation is paid, even though it does not reflect a full monetization of the economic loss involved, land redistribution policies are more widely accepted and proceed more easily.

Again, the point can be generalized: Many of the norms that structure traditional legal (and moral) analysis can be made to look arbitrary from an economic point of view. Distinctions between acts and omissions, or between active and passive uses of property, or

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than our overt losses explain.”).

<sup>55</sup> See Pildes, *supra* note 50, at 1549-54.

<sup>56</sup> The discussion here reports the results of ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT 194-97* (1987).

between intending to cause a harm and negligently causing it, appear to take "functionally" equivalent events and treat them differently. If the same quantum of damage results, what difference should it make whether the harm occurs through my wilful act or my indifferent neglect? Kaplow's critique of conventional transition and compensation rules is a subset of a more general economic critique of conventional legal categories.

Yet these kinds of distinctions, and these sorts of legal categorizations, remain pervasive in the law despite persistent critiques of the sort Kaplow offers.<sup>57</sup> One explanation for the recalcitrance of legal analysis to "functional" critiques is that the "arbitrary" distinctions such critiques ignore—between acts and omissions, for example—generate the baselines against which norms, such as norms of reciprocity, trust, and fairness, take on content. "Reciprocity needs terms of trade."<sup>58</sup> These baselines provide the necessary structure within which terms of fairness and cooperation can be developed and recognized. That is, conventional norms of this sort enable the formation of social capital; they help us decide what fair dealing means, whether the bargain being struck is between private individuals or between individuals and the state.

Attacking these norms as violating economic conceptions of efficiency can miss the role they play in defining fair reciprocity. And because we can now more readily see the role that such social norms play in sustaining both politics and markets, it becomes easier to recognize the counterproductive nature of attacking these norms in the name of efficiency. Robust norms of reciprocity enable cooperation on terms perceived as fair, and the ability of societies to sustain this kind of cooperation—even more, perhaps, than the content of their formal law—accounts for the success of political institutions and economic systems.<sup>59</sup> Social capital can be diminished through policies that directly undermine these norms. Thus, another means by which legal doctrine and public policy can interact destructively with social norms is through "rationalizing" formal state action in "functional" terms. Such terms can fail to

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<sup>57</sup> For a wonderful demonstration of the pervasiveness across an extraordinary array of legal fields of these kind of distinctions, see LEO KATZ, *ILL-GOTTEN GAINS* (1996). The theme of Katz's book is that the fact that these distinctions recur so pervasively indicates that the distinctions track central moral concerns and that economic efforts to rationalize these areas are troubling precisely because they fail to appreciate the power of these concerns.

<sup>58</sup> GIBBARD, *supra* note 28, at 261.

<sup>59</sup> See *supra* notes 39-40 and accompanying text.

appreciate the way traditional legal distinctions provide landmarks that help organize the norms of cooperation, reciprocity, and trust that enable the formation of social capital.

*C. Differences Between the Enforcement of  
Norms and the Enforcement of Laws*

A third way law can interact destructively with social norms is through failing to appreciate the complexity of the overall systems through which norms are created, enforced, and changed. Even when sophisticated policymakers attempt to follow the path Sunstein lays out and seek to draw on background norms to make public policy more effective, the failure to recognize the dynamic and structural characteristics of social norms as a system of social control can lead to policies that undermine this normative system. Social norms should not be viewed as just a set of substantive rules; they include further rules or practices regarding the most appropriate remedies for violations of these substantive norms. They also include norms of enforcement, including norms analogous to the state's "prosecutorial discretion." Yet when policymakers envision incorporating norms into state laws, they might too readily incorporate only the substance of social norms without recognizing that those norms are given content in practice through further norms about proper remedies and enforcement.

Consider the procedural and contextual constraints when the enforcement of norms takes place socially, outside of formal state control. Norms are created and enforced through a myriad of micro-interactions. At its best, this system of social norms possesses a variety of characteristics that might be difficult for the state to duplicate. First, the substance of norms or their application can be finely calibrated to different local communities—the workplace, the school, the household, the church, the street. Second, norms can allow for widespread participation in enforcement (although they do not always work this way); anyone can mock, ignore, reprimand, roll his or her eyes, and enforce norms in other ways. Third, the range of responses available may enable enforcement to be tailored to subtle differences in the contexts of violations; the subtlety of enforcement mechanisms enables highly nuanced distinctions between types of violations. Some violations can produce ironic laughter; others, social ostracism; still others, physical blows. Finally, and relatedly, norm enforcement is highly decentralized, which enables local variation in interpretation and enforcement.

To be sure, this is a particularly optimistic sketch of the system of social norms. As Eric Posner and David Charny point out in their contributions to this Symposium, social norms need not be efficient and should not be exalted above intentionally adopted rules or state policies without examination on a norm-by-norm basis.<sup>60</sup> Much of state law involves challenging, for good reasons, long-entrenched norms. But the point is that the substantive rules reflected in social norms are embedded within a larger system of social norms regarding what we might call jurisdiction, legislative process, fair notice, prosecutorial discretion, transition policy, equitable exceptions, and the like. Government incorporation of the substance of social norms into state policies is perhaps not likely to take this procedural-institutional framework into account. Yet given legal realist insights into the relationship between rights and remedies, government efforts to influence norms through law must take this larger system of social norms as a whole into account. If the state cannot replicate the flexibility and subtlety of the procedural-institutional structure within which substantive norms are given content, that should give policymakers pause before rushing to embrace an effort to shape norms through law.

Consider a concrete example. Within many (but as Hugh Grant attests, not all) social circles, there are norms against seeking sex from prostitutes. This norm is enforced only minimally through formal law enforcement; the primary enforcement mechanism is social, such as gossip, ostracism, scorn, and the like. Indeed, this norm might well be enforced through a relatively finegrained network of sanctions that are considered appropriately severe, but not inappropriately so, within different communities. But in some communities, local governments are now seeking to incorporate this norm and some of the social-sanctioning mechanisms for enforcement into public policies—in particular, through publishing the names of “Johns” in local newspapers that circulate in the community. The effort here is for the law to piggyback onto the authority of social norms by invoking the sanction of public humiliation to enforce the legal prohibition.

When this norm is enforced only socially, distinctions might be drawn between those who are known to frequent prostitutes regularly and those whose one-time conduct is known only, say, to

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<sup>60</sup> See David Charny, *Illusions of Spontaneous Order: Norms in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996); Posner, *supra* note 22.

a spouse. Moreover, a woman who learns of her partner's violation of this norm has some control over how to respond to the violation; whether the relevant sanctions will be confined to the couple themselves, or whether she will reveal it more generally by, for example, leaving the relationship and announcing the violation as her reason. If she decides that disclosure is too embarrassing to herself and others, she might choose not to disclose.

Once the state decides to enforce this norm through shaming techniques that appear similar to those of the social-norm sanctioning system, though, the state might well not incorporate the entire procedural-institutional framework within which the norm would be given content were enforcement left outside the state. Thus, government officials will perhaps require publication for each arrest, without more calibrated distinctions among contexts. And this might lead to counterproductive results for the very people who are supposed to be among the beneficiaries of such governmental policies.

Thus according to one newspaper account of such a program in Ohio, publication of the name of a man found soliciting a prostitute humiliated not only him, but created additional and much more public humiliation for his wife.<sup>61</sup> Moreover, their children learned of the conduct and were humiliated as well.<sup>62</sup> This public humiliation can change the norms now confronting the wife trying to decide what to do; her failure to take dramatic public action, such as leaving the husband or forcing him out of the house, might be seen as a further loss of face. And the more public the punishments, the more the children become aware of their father's conduct. The flexibility the aggrieved partner and friends might otherwise have in dealing with the violation, in which the response can be tailored to the specific context, can quickly become lost once the state tries to lend a hand to the relevant norms through techniques like mandated publication.

Those who urge more self-conscious efforts to use law to influence norms, or to incorporate norms into law, need to recognize the overall system of rules, remedies, and enforcement techniques that constitute social norms as a system of social control. Failure to appreciate the system within which substantive norms are embedded can lead policymakers to undermine the very norms they

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<sup>61</sup> See John Hopkins, *Publishing Names of 'Johns' Punishes Families, Wife Says*, CIN. ENQUIRER, Apr. 18, 1996, at B1, available in LEXIS, News Library, Cinnqr.

<sup>62</sup> See *id.*

seek to enhance, or to compromise other values. This is not to reject the project Sunstein recommends, but only to caution against an easily obscured darker side it might have. Good faith efforts to make law more attentive to social norms can, paradoxically, weaken the very norms at stake.

#### CONCLUSION: LAW AND NORMS REVISITED

As the limits on the effectiveness of formal law and public policy become more apparent, we are becoming increasingly aware of the central role social norms play in enabling and stabilizing productive social interaction—whether in the economic sphere, the political arena, or the social realm. Economic analysis and rational-choice modelling have pointed out the pervasiveness of the potential for opportunistic self-regarding action that diminishes overall social welfare. But if prisoners' dilemmas confront us at every turn, the solution is not omnipotent state enforcement of formal rules that seek to surmount these dilemmas. Instead, informal norms will have to bear much of the burden of ensuring productive cooperation rather than collectively self-destructive exploitation. In particular, norms of reciprocity help provide the baseline framework that structures, organizes, and facilitates cooperation and thereby enables trust to arise and be sustained. Whether the problem is the safety and vitality of city neighborhoods, or the success of market economies and democratic politics, the right social norms will be just as critical to ensuring well-functioning systems as formal state policies.

More generally, social capital—strong norms of cooperation and trust, as well as effective structures and networks of civic engagement within which these norms can be developed and sustained—underwrites the successful enforcement of formal state policy. Once this interdependence is seen, it becomes tempting to use law to influence norms. This is the direction Sunstein seeks to take the relationship, and I would endorse much of what he proposes. To the extent behavioral responses to law and policy inevitably will be filtered through social norms and the cultural understandings embedded within them, any effective approach to policymaking will have to take these norms into account. But I want to offer a cautionary tale as well, for formal law and informal norms bear a potentially darker and more antagonistic relationship to each other than the optimistic account Sunstein stresses.

If state law can influence social norms, the relationship can just as readily become destructive as productive. Actions of the state can destroy social capital through insufficient appreciation of the role social capital plays and the mechanics of its maintenance. This Comment has suggested three examples of means by which law can undermine social capital: (1) indirectly, by destroying the structural conditions necessary to enable norms of cooperation to arise—as in the case of urban renewal projects; (2) directly, by attacking norms of reciprocity through efforts to “rationalize” conventional legal practices with more “functional” analyses that dissolve traditional distinctions such as those between government-imposed harms and privately-imposed harms—as in the case of economic approaches to the problem of legal transitions; and (3) indirectly, by failing to recognize that incorporating the substance of social norms into coercive state regulations may fail to incorporate the remedial flexibility available when norms are enforced socially rather than through state laws—as in the case of state-mandated publication of the names of those who hire prostitutes.

In short, norms play a much greater role than we have realized before in enabling formal law to be effective, and the system of social capital is a fragile resource that policymakers must conserve and enhance even as they inevitably draw on it. Once we recognize the interdependence of law and norms, it is tempting to see only one direction of influence, and to seek to use law to shape social norms. But law can also undermine social norms and destroy social capital, and those of us concerned with emphasizing the mutually shaping role of law and norms must be equally attentive to this destructive capacity of the state.

